No. 86 1616

IN THE

Supreme Court of the United States

October Term, 1986

PLUMBERS AND STEAMFITTERS UNION LOCAL 598, DONALD LANE, LARRY J. SALTZ, BUDDY D. WRIGHT, PEDRO A. NICACIO, III, ROY A. SALTZ, and ALLEN DETRICK,

Petitioners,

v.

WASHINGTON PUBLIC POWER SUPPLY SYSTEM

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE WASHINGTON STATE COURT OF APPEALS, DIVISION III

* HUGH HAFER
JOHN BURNS
Hafer, Price, Rinehart
& Schwerin

* Counsel of Record for
Petitioners

2505 Third Ave.
Suite 309
Seattle, Washington 98121
(206) 728-7280

FRAYN PRINTING COMPANY SEATTLE, WASHINGTON

I. Question Presented

Whether the employees of a private firm which has contracted with a governmental entity to perform construction work on publicly owned property are deprived of constitutionally protected liberty and property interests without due process of law when the governmental entity suspends the employees from access to the job site without pre- or post-suspension notice or hearing.

II. List of Parties

Petitioners are Plumbers and Steamfitters Union Local 598, Donald Lane, Larry J. Saltz, Buddy D. Wright, Pedro A. Nicacio, III, Roy A. Saltz and Allen Detrick.

Respondent is the Washington Public Power Supply System.

TABLE OF CONTENTS

APPENDICES:

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

No. _____

IN THE

Supreme Court of the United States

October Term, 1986

PLUMBERS AND STEAMFITTERS UNION LOCAL 598, DONALD LANE, LARRY J. SALTZ, BUDDY D. WRIGHT, PEDRO A. NICACIO, III, ROY A. SALTZ, and ALLEN DETRICK,

Petitioners,

v.

WASHINGTON PUBLIC POWER SUPPLY SYSTEM

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE WASHINGTON STATE COURT OF APPEALS, DIVISION III

The Petitioners, Plumbers and Steamfitters Union Local 598, et al., respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Washington State Court of Appeals, Division III, which became the decision terminating review in the above entitled proceeding on January 6, 1987.

Opinions Below

The opinion of the Washington State Court of Appeals, Division III is reported at 44 Wash. App. 906, 724 P.2d 1030, and is reprinted in the appendix hereto, p. 1 A, *infra*.

The Findings of Fact and Conclusions of Law and Order of the Benton County Superior Court, State of Washington, has not been reported. It is reprinted in the appendix hereto, p. 1 B, *infra*.

Jurisdiction

Petitioners brought this case in the Benton County Superior Court, State of Washington. On March 29, 1985, the Superior Court entered judgment in favor of Respondent.

On Petitioner's appeal, the Washington State Court of Appeals, Division III on August 14, 1986, affirmed the judgment of the Superior Court.

A timely motion for reconsideration to the Court of Appeals was denied on October 10, 1986, and a timely Petition for Review to the Supreme Court of the State of Washington was denied on January 6, 1987. The opinion of the Washington State Court of Appeals, Division III filed on August 14, 1986 became the decision terminating review of this case on January 6, 1987.

This Petition for Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

Constitutional Provisions Involved

U.S. Const. amend. XIV, § 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statement Of The Case

The six individual Petitioners were employed as pipefitters by the Bechtel Power Corporation (Bechtel). Bechtel was engaged in the construction and completion of Respondent Washington Public Power Supply System's (Supply System) Nuclear Project No. 2, located on the Federal Government's Hanford Reservation in Benton County, Washington. Supply System is a municipal corporation and joint operating agency in the State of Washington.

On November 17, 1982, a rally was held at the construction

site to protest the use of a non-union bus company. Petitioners, along with fifty to seventy-five other craftsmen, were present at this rally. A physical altercation and rock throwing incident ensued at the rally.

On the basis of an internal incident report prepared by its own security guards, Supply System identified the six Petitioners as participants in or bystanders at the incident.

On November 19, 1982, without a prior notice or hearing, each of the Petitioners were notified by letter from Supply System that their actions were in violation of published Supply System security regulations. They were "immediately restricted indefinitely from access to any Supply System property." (Trial Exs. 3, 10, 17, 24, 31, 38). The letters did not discuss or disclose the evidence against the Petitioners. The letters notified the Petitioners that they had five days to submit written statements of mitigating circumstances, after which Supply System would determine "whether to continue your restriction from the Supply System's property and for how long." (Trial Exs. 3, 10, 17, 24, 31, 38).

Copies of these letters were also sent to the Petitioners' employer, Bechtel. As a result of the access restriction there was no available work with Bechtel for the Petitioners. (Tr. Ex. 65, p. 11). Consequently, on November 19, 1982, each of the Petitioners was sent a notice of termination of employment by Bechtel.

Each of the Petitioners responded in writing as requested by the restriction letters. Each Petitioner denied the charges contained in the restriction letter, and each submitted a statement of his own account of the incident. Most of the statements indicated the availability of corroborative witnesses.

On December 1, 1982, a meeting was held by the Supply System officers charged with the responsibility for making the final decision regarding access restriction. The affected workers were not present at, nor were they aware of, the meeting. At the meeting the officers considered the internal incident report prepared by the Supply System security guard, and a Supply System security division investigation and report. Both reports were based only on the acount of the WPPSS security guard, and on statements taken from witnesses who were riding on the

buses involved in the incident. Those statements were taken only after the witnesses requested total anonymity and were assured that their identities would not be divulged. The officers reviewed the written responses of the Petitioners. The officers never interviewed the Petitioners, however, nor did they interview persons offered by the Petitioners as corroborative witnesses.

A final decision was made at the officer's meeting to restrict three of the Petitioners (L. Saltz, Wright and Lane) for one year, and three of the Petitioners (R. Saltz, Detrick and Nicacio) for thirty days, from coming onto or doing any work on Supply System property.

How the Federal Question Was Raised

As a result of the foregoing, the Petitioners brought an action against Supply System in the Benton County Superior Court, State of Washington for injunctive relief and for damages. Petitioners alleged, *inter alia*, that their 14th Amendment due process rights were violated when Supply System summarily suspended them from access to the job site. The trial court bifurcated the trial and ruled that it would not take testimony to establish what actually occurred during the incident, but would focus only on issues of liability. Issues relating to damages were reserved for a later date. The trial court determined that Petitioners had not been deprived of any protectable property or liberty interest which would entitle them to due process of law. Consequently, the Complaint was dismissed. (p. 8-B, *infra.*)

Appeal was taken to the Washington State Court of Appeals, Division III, from the adverse judgment of the Benton County Superior Court.

The Court of Appeals, in a 2-1 decision, affirmed the judgment of the Superior Court. The primary basis for the Court of Appeals' decision was, in the Court of Appeals' words, that:

> [T]he six workers were not WPPSS employees so the suspension did not terminate any employment relationship between them. WPPSS merely suspended the workers from

> coming on its property because of their participation in unprotected activity in violation of its site security rules. The workers have failed to establish any constitutional right to come onto WPPSS property . . . . Since we have held the workers did not have a constitutional right to come onto WPPSS property, no constitutional due process rights such as notice and hearing are involved. (p. 10-A, *infra*).

Reasons For Granting The Writ

I. THE DECISION BELOW RAISES SIGNIFICANT PROBLEMS CONCERNING THE DUE PROCESS RIGHTS OF A LARGE NUMBER OF SIMILARLY SITUATED PRIVATE CONTRACTOR EMPLOYEES.

The decision below raises serious questions regarding the status of private contractor employees who are working on public projects. On November 19, 1982, Petitioners received letters from Supply System in which they were accused of violating published security regulations. In the same letter, Supply System notified them that they no longer had access to the job site. Since Petitioners could not get to the job site, Petitioners' employer had no choice but to terminate their employment, and did so the same day, November 19. Throughout this process Petitioners were given no opportunity for a hearing. As noted by the dissent in the Court of Appeals:

> The six workers were told that they were guilty of unnamed acts which were a violation of undesignated rules and guilt was determined through interviews with undisclosed witnesses who gave statements, the contents of which were likewise not disclosed. The workers were advised by letter, not that they may offer evidence of their innocence, but only that they may provide statements of mitigating factors.

(p. 19-A, *infra*).

This Court has recognized that "the right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within the "liberty" and "property" concepts of the Fifth Amendment . . . ." *Greene v. McElroy,* 360 U.S. 474, 492 (1959). This fundamental right is protected from state interference by the Fourteenth Amendment. The Court reaffirmed this principle in *United States v. Robel,* 389 U.S. 258, 265 n. 11 (1967). Private contractor employees are protected by the Constitution from arbitrary governmental interference with their private employment. Thus, before the government excludes a person from his specific private employment it must apply due process of law.

An essential principle of due process is that a deprivation of liberty or property "be preceeded by notice and opportunity for hearing appropriate to the nature of the case." *Cleveland Board of Education v. Loudermill,* 105 S. Ct. 1487, 1493 (1985); *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 313 (1950). This opportunity must be granted at a "meaningful time and in a meaningful manner." *Armstrong v. Manzo,* 380 U.S. 545, 552 (1965). It is true that "not all situations calling for procedural safeguards call for the same kind of procedure." *Morrissey v. Brewer,* 408 U.S. 471, 481 (1972). This does not, however, affect the "root requirement that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest . . . ." *Boddie v. Connecticut,* 401 U.S. 371, 378 (1971) (emphasis in original).

The Court of Appeals' decision would allow the government to interfere with the specific private employment of thousands of private contractor employees without any hearing whatsoever. The federal and state governments expend billions of dollars on the construction of public projects, and there are large numbers of private employees working on such projects. Application of the Court of Appeals' decision would impose substantial restraints on the employment opportunities of numerous people in a way which conflicts with "long accepted notions of fair procedures." *Greene v. McElroy,* 360 U.S. 474, 506-07 (1959).

Based on 1982 Census figures, the total capital outlay for

construction by state and local government in the State of Washington for 1981-82 was $2,909,609,000. Combined total capital outlay for construction by state and local government for all fifty states and the District of Columbia for 1981-82 was $53,667,794,000.[1] More recent statistics on the value of new public construction put in place in the United States are equally revealing. In 1985, the value of new state and local government construction put in place totaled $50,505,000,000. The value of new federal construction put in place in 1985 totaled $12,362,000,000.[2]

The vast majority of this construction work is performed by private firms, since public agencies are usually governed by public bidding statutes which require the public agency to advertise for bids (See, e.g., 41 U.S.C. § 5; Wash. Rev. Code § 54.04.070).

The decision of the court below strips private contractor employees of their due process rights.[3] If the governmental agency involved is allowed to immediately suspend or restrict job-site access to the private contractor employee without a hearing, the employee's work opportunities will be subject to severe limitation without the benefit of "a meaningful hedge against erroneous action." *Cleveland Board of Education v. Loudermill,* 105 S. Ct. 1487, 1494, n. 8 (1985).

Lower Courts need guidance from this Court as to the due process protection which should be afforded private contractor employees engaged in work on public projects.

---

[1] Bureau of the Census, U.S. Dep't. of Commerce, No. 5, Compendium of Government Finances, 41 (1984).

[2] U.S. Dep't. of Commerce, Vol. 32, No. 6, Construction Review, 27 (Nov./Dec. 1986).

[3] The workers' union was without recourse against Supply System, since Supply System was not the employer and did not agree to arbitrate grievances of Bechtel's employees. See, e.g., *Sheetmetal Workers Union Local No. 110 v. Public Service Co. of Indiana, Inc.,* 771 F.2d 1071 (7th Cir. 1985).

II. THE DECISION BELOW IS IN CONFLICT IN PRINCIPLE WITH THE DECISIONS OF THIS COURT CONCERNING CONSTITUTIONALLY PROTECTED PROPERTY INTERESTS AND DUE PROCESS.

The employees of private contractors performing work on public land have an interest in access to that public land. Access to the job site is essential for the employee to be able to work, and thus to earn a living. In *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972), this Court stated that "[t]o have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Roth*, 408 U.S. at 577.

A person's interest in a benefit is a property interest for due process purposes if there are "mutually explicit understandings that support his claim of entitlement to the benefit." *Perry v. Sindermann*, 408 U.S. 593, 602 (1972). The "mutually explicit understandings" between the contracting government entity and the private contractor employees give rise to a legitimate claim of entitlement. Such employees rely on continued access to the job site, subject only to restriction on the basis of safety or security violations. (See, e.g., Plaintiff's Tr. Ex. 57, and Respondent's Post-trial submission of letters.)

> It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.

Board of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972). Once the state has granted access to state lands it may not arbitrarily deny access to particular individuals but by due process. "The Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits." *Board of*

Regents of State Colleges v. Roth, 408 U.S. 564, 576 (1972).

Thus, before the government can restrict a private contractor employee from access to the job site, it must provide notice and an opportunity to be heard. This minimum requirement is needed to ensure that the employee is indeed being restricted on the basis of safety or security violations, and not on the basis of arbitrary reasons or on the false accusations of anonymous witnesses. Access restriction cases will often involve factual disputes, and a prior hearing "facilitates the consideration of whether a permissible course of action is also an appropriate one." *Cleveland Board of Education v. Loudermill*, 105 S. Ct. 1487, 1494 (1985). "[P]ermitting the employee to give his version of events will provide a meaningful hedge against erroneous action." *Loudermill*, 105 S. Ct. at 1494. Supply System provided Petitioners with none of these Constitutional protections. Supply System refused to consider any evidence of guilt or innocence and allowed only the written submission of "mitigating circumstances." "The workers were prejudged without a hearing, convicted without a voice, and punished severely without any recourse." (p. 21-A, *infra*) (Thompson, J., dissenting).

In *Loudermill*, 105 S. Ct. at 1487, this Court balanced the tenured public employee's interest in retaining employment and the risk of erroneous termination with the government's interest in expeditious removal of unsatisfactory employees. The Court determined that the private interest in employment, coupled with the risk of erroneous government action, outweighed the government's interest. *Loudermill*, 105 S. Ct. at 1495. Consequently, the Court decided that a tenured public employee is entitled to pretermination "oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story." *Loudermill*, 105 S. Ct. at 1495. Those same competing interests involved in *Loudermill* are involved in the case of private contractor employees working on public lands. The balancing of those interests achieves the same result. The severity of depriving a person of the means of livelihood, coupled with the great risk of erroneous action, far outweigh the need for summary government restriction.

The decision below has denied to private contractor employees working on public lands the right to any sort of meaningful hearing. Petitioners never received a hearing from Supply System, from the trial court, or from the Court of Appeals. The methods used by Supply System to determine who should be suspended from access to the job site "did not comport with even the most rudimentary concepts of fairness." (p. 19-A, *infra*) (Thompson, J., dissenting). This case is typical of what can happen to the thousands of private contractor employees who work on the billions of dollars worth of public construction put in place each year. The Court of Appeals has created a dangerous precedent which strips the due process rights from those employees. It is a precedent at odds in principle with this Court's past decisions on the nature of the property interest protected by the Constitution, and the process which is due when those interests are deprived by the government. Reversal of the decision by this Court is essential.

CONCLUSION

For these reasons a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals.

Respectfully Submitted,

---

* Hugh Hafer
John Burns
* Counsel of Record

Appendix A

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

PLUMBERS AND STEAMFITTERS UNION LOCAL 598, DONALD LANE, LARRY J. SALTZ, BUDDY D. WRIGHT, PEDRO A. NICACIO, III, ROY A. SALTZ, and ALLEN DETRICK,	)	No. 7068-9-III
	)	Division Three
	)	Panel Two
Appellants,	)	
v.	)	
WASHINGTON PUBLIC POWER SUPPLY SYSTEM,	)	
	)	Filed
Respondent.	)	August 14, 1986

GREEN, C.J.—On November 17, 1982, Mr. Manion, a security officer employed by the Washington Public Power Supply System (WPPSS), was on patrol in the swing shift parking lot on the west side of WNP-2, a nuclear plant under construction in Benton County. He reported:

> I observed about 75 crafts people approaching the bus parking area where a Ben Franklin bus was offloading personnel. As I approached, I observed some rocks being thrown at the bus. As the craft people on the bus attempted to exit, the people from the parking lot blocked their way. One of the individuals on the bus did step off the bus onto the ground. . . . He was later identified to me as:
>
> Rodney Harrington, Carpenter
> Badge No. 0009
>
> As he stepped onto the ground he was struck in the face by one of the crafts personnel from

the parking lot, knocking him back against the side of the bus. I stepped in to stop the fight pulling one of the men off Harrington who had been hit. I was grabbed by some of the people from the parking lot and kept from stopping the fight. I turned to some of the craft people in the parking lot and asked them to stop the fight. As I turned back to see what was happening, I observed that Mr. Harrington was surrounded by about 25 crafts people and was lying on the ground being kicked by someone and being struck about the face and head by others. The crafts people I had asked to stop the beating stepped in and did stop it.

I made contact with:

Rodney Harrington
WNP-2 First Aid Station

where he was receiving treatment for facial injuries. I asked Harrington if he would prepare a statement of circumstances surrounding his injuries and identify the individuals involved. Harrington stated he did not know any of the individuals and refused to discuss the incident with anyone except his Union Business Agent.

A Mr. Frank Sartain, Carpenter General Foreman made contact with me at the WNP-2 First Aid Station and provided a written statement (Attachment #1).

Attachment #1

I was on my way to work, when I got off the Ben Franklin Bus. I was on the first bus about 7:00 AM. There were about 10 people waiting in the swing shift parking lot, then more people came [approximately] 30. Garry Young was grabbed in [the] front part of his leather jacket, and jerked around. He handed me his lunch box; several in the group went to calling us names. *Don Lane* grabbed my arm, I pulled loose, then he swung on me, and hit me in the left jaw. I walked away toward the

> gate and there were a large [number] of people going toward the bus stop. I was told that the man that shook Garry up, name was *Bud Wright*. I can identify him.
>
> /s/Frank Sartain, Sr.
> 11-17-82

Witness
/s/ Robert A. Manion
11-17-82

(Italics ours.) This incident arose because union employees were being transported to work on nonunion buses. As a protest, the group had gathered in the parking lot to prevent them from leaving those buses. Initial investigation by WPPSS identified some of the participants in the melee and on November 19, WPPSS issued letters to Donald Lane, Larry J. Saltz, Buddy D. Wright, Pedro A. Nicacio III, Roy A. Saltz and Allen Detrick suspending each of them from coming onto WPPSS property. They were given 5 days to respond in writing as to mitigating circumstances before WPPSS reached a final decision on the matter. Those men were employed by Bechtel Corporation, a WPPSS subcontractor. On the same day, November 19, Bechtel fired these six workers without waiting for WPPSS to complete its investigation and reach a final decision. Thereafter, each of the workers submitted written statements admitting their presence at the affray. WPPSS completed its internal investigation and on December 1, 1982, restricted some for 30 days and the rest for 1 year from its property. This investigation included statements from other union workers who witnessed the event and identified the involvement of the six workers and requested anonymity because they feared retaliation. WPPSS honored their request.

The six workers first challenged Bechtel's right to terminate their employment and following arbitration, the arbitrator upheld the discharges. They then commenced this action against WPPSS for damages contending WPPSS had no right to restrict them from coming onto WPPSS property and as a result tortiously interfered with their contract of employment by Bechtel. The trial court limited the trial to the question of liability, deferring the question of damages. Following that

hearing, the court held in favor of WPPSS and dismissed the action. The six workers and Plumbers and Steamfitters Union Local 598 appeal.

Four basic issues are presented: (1) Did WPPSS have the underlying authority to restrict the workers from coming onto WPPSS property? (2) Were the workers engaged in protected labor activity? (3) Did WPPSS unlawfully deprive the workers of a protectable property or liberty interest without due process of law? (4) Did WPPSS tortiously interfere with the workers' employment contract with Bechtel? We affirm.

First, the contention WPPSS had no authority to preclude people from coming onto its property must be rejected. An operating agency constructing or operating a nuclear power plant has statutory authority to establish a security force for the protection and security of the site. RCW 43.52.520. Members of the security force "may use reasonable force to detain, search, or remove persons who enter or remain *without permission* within the nuclear power plant site . . ." (Italics ours.) RCW 43.52.530(1). Implicit in this provision is the power to grant permission. Inherent in the power to grant is the authority to withdraw its permission for the six workers to come onto its property.

Second, the contention that the rules the workers allegedly violated were not properly adopted pursuant to the rulemaking procedure delineated in the Administrative Procedure Act (APA) must also be rejected. "WPPSS is a municipal corporation", *Lampson Universal Rigging, Inc. v. WPPSS*, 105 Wn.2d 376, 379, 715 P.2d 1131 (1986); RCW 43.52.250, .360, with the power to "make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws." Const. art. 11, § 11. A municipal corporation is not an "agency" as defined in the APA, RCW 34.04.010(1), because it is not a "state agency". Rather it is a "local agency". RCW 42.17.020(1).[1] Thus, the Washington APA does not apply

[1] RCW 42.17.020(1) defines agency:

"'Agency' includes all state agencies and all local agencies. 'State agency' includes every state office, department, division, bureau, board, commission, or other state agency. *'Local agency' includes* every county, city, town, *municipal corporation*, quasi-municipal corporation, or special purpose district, or any office, department, division, bureau, board, commission, or agency thereof, or other local public agency." (Italics ours.)

and WPPSS need not comply with its rulemaking procedure. *Riggins vs. Housing Authority*, 87 Wn.2d 97, 101-01, 549 P.2d 480 (1976).

Third, it is claimed the workers were engaged in protected labor activity and therefore could not be penalized for their actions. We disagree.

RCW 49.36.010[2] allows working men and women to organize themselves and carry out the legitimate purposes of the union by "any lawful means." However, concerted activities which are unlawful, violent, in *breach of contract*, or indefensible are not protected. *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 8 L. Ed. 2d 298, 304, 82 S. Ct. 1099 (1962); *see also Coors Container Co. v. NLRB*, 628 F.2d 1283, 1287 (10th Cir. 1980); *Mosher Steel Co. v. NLRB*, 568 F.2d 436, 442 (5th Cir. 1978); *Florida Steel Corp. v. NLRB*, 529 F.2d 1225, 1234 (5th Cir. 1976); *NLRB v. Red Top, Inc.*, 455 F.2d 721, 727 (8th Cir. 1972); *Corriveau & Routhier Cement Block, Inc. v. NLRB*, 410 F.2d 347, 351 (1st Cir. 1969). Concerted activity which interferes with or blocks the ingress and egress of employees and others at a place of employment is considered inherently coercive and thus unprotected labor activity. *Youngdahl v. Rainfair, Inc.*, 355 U.S. 131, 132, 2 L. Ed. 2d 151, 78 S. Ct. 206 (1957); *NLRB v. Service Employees Int'l Union Local 254*, 535 F.2d 1335 (1st Cir. 1976); *NLRB v. United Mine Workers of Am.*, 429 F.2d 141, 146 (3d Cir. 1970); *15 McKay Place Realty Corp. v. 32B-32J, Service Employees Int'l Union*, 576 F. Supp. 1423, 1428 (E.D.N.Y. 1983); *see also Bering v. Share*, 106 Wn.2d 212, 224-25, ___ P.2d ___ (1986).

---

[2] RCW 49.36.010 provides:

"It shall be lawful for working men and women to organize themselves into, or carry on labor unions for the purpose of lessening the hours of labor or increasing the wages or bettering the conditions of the members of such organizations; or carry out their legitimate purposes by *any lawful means*." (Italics ours.)

Further, here, the stabilization agreement for WPPSS units 1, 2, and 4 signed by Bechtel and the union, specifically provides in 15(1):

> There shall be no strikes, work stoppages, slowdowns or other collective actions which will interfere with, or stop the efficient operation of, construction work of the Employers. Participation by an employee, or group of employees, in an act violating the above provisions will be cause for discharge . . .

Thus, under this agreement, Bechtel had the authority to discharge the six workers even if WPPSS had not restricted their access to the property.

Further, the six workers in their own letters and statements to WPPSS presenting mitigating circumstances clearly establish that the group of union workers gathered in the swing shift parking lot on November 17, 1982, about 7 a.m. interfered with or blocked the ingress of employees on the buses. Larry J. Saltz, in his letter, stated:

> At this time I went over to another bus which was getting ready to stop. This is when I went to the door of the bus to explain about non union buses to some of the union personnel riding it. Then I proceeded to say "Please stay on the bus." . . .
>
> I repeated myself 3 to 4 times saying "please" every time.

In a more detailed statement, he said:

> We walked over to the buses and asked the passengers to *please get back on the bus, we don't want any trouble*. One of the passengers, Rod Harrington, approached me with vocal language and asked me "Who in the fuck are you?" and he said "Are you trying to prove

> something to me?" I responded, *"I don't want to start any trouble,* please get back on the bus."

(Italics ours.) Roy Lee Saltz gave the following description of the incident:

> By then the second bus had arrived and was coming to a halt. When the bus stopped my brother and I went to the door to explain to the people on the bus that this is a non-union bus and that since they are union people it was not right for them to ride it. We continued by saying *"Please stay on the bus"* (exact words) and repeated three or four times *because we didn't want to see another confrontation.* At this time a man named Rod Harrington . . . came out of the bus and my brother repeated "Please stay on the bus" and Mr. Harrington asked what he was going to do to stop him and at the same time Rod pushed my brother and went into his coat for a knife. This is when my brother stopped him in self defense and then put him back on the bus so he would not be hurt anymore. The bus then continued down the road.

(Italics ours.) Allen Detrick stated:

> I was with a group of people who met the bus trying to talk the people into not riding the bus . . . I talked to some people that came off the bus to try to convey our feelings about the situation.

Donald Lane stated:

> I proceeded to the gate and noticed a large crowd and I went to investigate it, and witnessed people telling other people who were riding the bus they should not be riding it

> because it was non-union. I saw one of our local brothers . . . who was riding the bus, and I told him my beliefs on why he shouldn't be riding the bus.

Buddy Wright stated:

> So then we proceeded to ask some of our own brothers why they were riding a non-union bus, and we only talked to them . . .

Pedro A. Nicacio III, in his letter, stated:

> The first bus had just left and the second bus was arriving. I stood by and saw some men go to the bus and talk to the people on the bus, and the bus then left. A third bus arrived, and again a group of men went to the bus and talked to the passengers, while I stood by in the crowd watching. I saw Rod Harrington walk off the bus and push one of the men and a fight started. After the fight, Harrington got back on the bus. The bus then pulled away . . .

Also, there is overwhelming evidence of the coercive atmosphere during the incident, for example: Don Lane stated in his letter that he grabbed Frank Sartain's arm and hit him once; Larry Saltz's statement tells of the altercation between himself and Rod Harrington; and his brother Roy's statement and letter corroborate Larry's and Don Lane's statements about the altercations they were involved in; Pedro Nicacio III's and Allen Detrick's statements clearly demonstrate violence occurred during the incident; WPPSS' security guard R. A. Manion, who was an eyewitness to the incident, stated:

> I observed some rocks being thrown at the bus. As the craft people on the bus attempted to exit, the people from the parking lot blocked their way. One of the individuals on the bus did step off . . . As he stepped onto the ground he was struck in the face by one of the

> craft personnel from the parking lot. . . . I observed that Mr. Harrington was surrounded by about 25 crafts people and was lying on the ground being kicked by someone and being struck about the face and head by others.

Frank Sartain, one of the injured employees riding the bus, made a written statement specifically identifying Don Lane as the person who assaulted him—"Don Lane grabbed my arm, I pulled loose, then he swung on me, and hit me in the left jaw." Bechtel's injury record on Rodney Harrington dated November 17, 1982, states he had contusions to his head and right eye; Bechtel's injury record on Frank Sartain stated minor injury to right hand, contusion to his jaw and a sprained right wrist. From the above it is clear this was a concert of action by all of the union workers assembled in the swing shift parking lot on the morning in question to coerce and prevent the union employees riding on non-union buses from leaving those buses and going to work. This concerted action by the group to block the egress of workers from the buses and their ingress to the plant is not a protected labor activity. Moreover, the entire event was in direct contravention of the specific provisions of the WPPSS stabilization agreement signed by the union.

Fourth, the contention the workers had a constitutional right to retain their jobs free from unreasonable government interferences is without merit.

The right to hold specific private employment and follow a chosen profession free from *unreasonable* government interference is a fundamental right which comes within the liberty and property concepts of the Fifth Amendment. *Greene v. McElroy,* 360 U.S. 474, 492, 3 L. Ed. 2d 1377, 79 S. Ct. 1400 (1959); *Duranceau v. Tacoma,* 27 Wn. App. 777, 780 620 P.2d 533 (1980). Here, in light of the unprotected labor activity in which the six workers took part, we find WPPSS' suspension of them reasonable.

Further, *Greene* has been restricted to its particular facts and construed to mean liberty and property interests are implicated in an employment discharge situation if the government:

(1) imposes a stigma and thereby forecloses the employee's freedom to obtain other employment; or (2) dismisses an employee on grounds calling into question his integrity, honor, or good name in the community. *Jordan v. Oakville*, 106 Wn.2d 122, 131, ___ P.2d ___ (1986); *Ritter v. Board of Comm'rs*, 96 Wn.2d 503, 510, 637 P.2d 940 (1981); *Giles v. Department of Soc. & Health Servs.*, 90 Wn.2d 457, 461, 583 P.2d 1213 (1978); *Butler v. Republic Sch. Dist.*, 34 Wn. App. 421, 661 P.2d 1005 (1983). With respect to the first prong, the six workers failed to produce any evidence they were unable to obtain employment in their chosen occupation elsewhere, as occurred in *Greene v. McElroy*, 360 U.S. at 475-76. As to the second prong, "[n]early any reason assigned for dismissal is likely to have some negative reflection on an individual. However, not every dismissal assumes a constitutional magnitude." *Giles v. Department of Soc. & Health Servs., supra* at 461. The six workers here were suspended from WPPSS' property for violation of WPPSS' security rules. Such activity does not implicate the workers' integrity, honor or good name in the community. Therefore, the six workers have not established interference with a protected property or liberty interest in any event.

Moreover, the six workers were not WPPSS employees so the suspension did not terminate any employment relationship between them. WPPSS merely suspended the workers from coming on its property because of their participation in unprotected activity in violation of its site security rules. The workers have failed to establish any constitutional right to come onto WPPSS property.

Fifth, it is argued WPPSS' summary procedure denied them notice of the evidence against them and an opportunity for hearing and thus, they were denied that process due as a necessary prerequisite for deprivation of a constitutionally protected right. Since we have held the workers did not have a constitutional right to come onto WPPSS property, no constitutional due process rights such as notice and hearing are involved. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. ___, 84 L. Ed. 2d 494, 105 S. Ct. 1487 (1985), cited by the workers, is distinguishable because there Loudermill sued his employer, Cleveland, for not providing a pre-termination hearing. Other

cases cited by the workers are similarly distinguishable. Here, the workers were not employed by WPPSS.

However, assuming arguendo some procedural process was due, the scope of due process application is flexible, that is, "not all sitatuions calling for procedural safeguards call for the same kind of procedure." *Morrissey v. Brewer,* 408 U.S. 471, 481, 33 L. Ed. 2d 484, 92 S. Ct. 2593 (1972); *Dawson v. Troxel,* 17 Wn. App. 129, 131, 561 P.2d 694 (1977). There must be a weighing of the governmental action against the private interest that has been affected. *Cafeteria Workers Union Local 473 v. McElroy,* 376 U.S. 886, 895, 6 L. Ed. 2d 1230, 81 S. Ct. 1743 (1961). Even an employee protected by the state civil service laws does not have a due process guaranty of a hearing prior to termination. *Halliburton v. Huntington,* 20 Wn. App. 91, 95, 579 P.2d 379 (1978); *Ticeson v. Department of Social & Health Servs.,* 19 Wn. App. 489, 494-95, 576 P.2d 78 (1978). In fact, *Arnett v. Kennedy,* 416 U.S. 134, 40 L. Ed. 2d 15, 94 S. Ct. 1633 (1974), held a post-termination hearing is sufficient to protect those interests meriting due process protection, whether those interests were in the nature of "property" or "liberty". "Due process requirements are not technical, nor do they require any particular form or procedure." *Parker v. United Airlines, Inc.,* 32 Wn. App. 722, 727-28, 649 P.2d 181 (1982) (citing to *Mitchell v. W. T. Grant Co.,* 416 U.S. 600, 40 L. Ed. 2d 406, 94 S. Ct. 1895, 1901 (1974)).

Here, WPPSS' "Policy for Review of Violations of Safety/ Security Regulations" provides:

> The Supply System will, in all cases, provide a fair and impartial review of reports of violations of Safety/Security rules that may result in disciplinary action against an individual. This review will include Supply System Project Management and Safety/ Security Management and offer an opportunity for input through Bechtel Labor Relations by the affected individual's Labor Union Representative prior to disciplinary action being taken.

. . .

> In those incidences where immediate suspension from Supply System property is deemed to be in the best interest of the Supply System, (drugs, fighting, etc.), the projects will notify Security Management and a suspension letter will be immediately dispatched to the individual and Bechtel Labor Relations. Bechtel Labor Relations is responsible for notifying the individual's Business Agent of the suspension. Business Agent/Individual must respond to Supply System project management through Bechtel Labor Relations with mitigating circumstances concerning actions taken within 5 working days. Review process remains the same.

Several important facts must be noted. First, unlike the cases cited above, WPPSS was *not terminating* the employment of the six workers. Suspension, being less severe than termination, logically requires less due process protection. Second, Bechtel terminated the six workers' employment before WPPSS had completed its investigation and review and made a final decision. WPPSS did not complete its review process until December 1, 13 days after the incident. Even if WPPSS had afforded the six workers a hearing before an impartial tribunal, with the entire panoply of procedural due process rights, and decided the six workers should not be restricted, there is nothing to indicate Bechtel would be required to rehire them. Once Bechtel terminated the six workers, a hearing at this stage by WPPSS would not have prevented that which had already occurred.

Sixth, it is contended there was no evidence to support the conclusion WPPSS' rules were violated; thus, WPPSS arbitrarily and capriciously restricted the workers from its property. We disagree.

WPPSS' site security rules, which were posted around the plant of WPPSS project 2, specifically prohibit disruption of site constr[illegible] activities and physically assaulting others. Moreover, the union's agreement with Bechtel prohibited such disruption. Here, as presented earlier in this opinion, the

security guard who was an eyewitness to the incident stated he observed the union workers blocking the way of the employees who were attempting to exit the buses and the physical assault by the union workers of a person who got off one of the buses. This was corroborated by the written statement of one of the victims. Finally, the six workers' own statements admit to conduct which obstructed the employees ingress onto WPPSS property and that violence occurred. No due process procedure was required prior to WPPSS' suspension of the six workers pending further review. Even if the anonymous informant statements were not considered, there was sufficient evidence to support WPPSS' action in restricting the six workers from its property.

Seventh, it is claimed the WPPSS procedure was unreasonable because a longer response time is given for parking violations than for safety/security violations. We disagree.

WPPSS' "Policy for Review of Violations of Safety/Security Regulations" provides that in those incidences where immediate suspension from WPPSS property is deemed to be in the best interest of WPPSS, the suspended worker is only allowed 5 working days to respond with any mitigating circumstances while a worker with a parking violation is allowed 10 working days to respond with any mitigating circumstances. The differences in the worker's response time is not unreasonable for two reasons. One, when a distinction is based on a legitimate governmental interest such as police powers, then no violation of due process occurs. *Ford v. Bellingham-Whatcom Cy. Dist. Bd. of Health*, 16 Wn. App. 709, 558 P.2d 821 (1977). Here the distinction and procedures afforded are due to the fact the safety and security of the WPPSS plant is at issue, *i.e.*, a legitimate exercise of police power exists. Second, the shortened response time with the suspension from WPPSS property versus that for parking violations is actually of benefit to the worker. It stands to reason that one who has been suspended and thus cannot work would want the alleged violation dispute resolved quickly so he could return to work as soon as possible.

Eighth, it is asserted the workers' equal protection rights were violated because WPPSS only took action against them and took no action against the others involved in the episode.

We disagree. Equal protection requires persons similarly situated be similarly treated, *Jenkins v. State*, 85 Wn.2d 883, 540 P.2d 1363 (1975), *i.e.*, the law must be applied equally to members of the same class. *Duffy v. Department of Soc. & Health Servs.*, 90 Wn.2d 673, 585 P.2d 470 (1978). However, laxity in enforcement of a rule or regulation as to some is not a defense on equal protection grounds to enforcement against others absent the use of arbitrary or prohibited grounds to determine the specific instances of enforcement. *Crown Zellerbach Corp. v. Department of Labor & Indus.*, 98 Wn.2d 102, 110, 653 P.2d 626 (1982); *Somer v. Woodhouse*, 28 Wn. App. 262, 267, 623 P.2d 1164 (1981). Here, the six workers argue there were two sides to the dispute yet they were the only ones disciplined. However, they do not point out how this distinction was arbitrary or made on prohibited grounds. The evidence shows they were in the group which initiated the incident. The law does not prevent WPPSS from making an example of them.

Ninth, it is contended WPPSS impaired the obligation of the union's contract with Bechtel by restricting the six workers from the workplace precipitating their loss of contract employment rights. We need not consider this contention as it was neither raised in the trial court nor is adequate authority cited on appeal. *In re Rosier*, 105 Wn.2d 606, 616, 717 P.2d 1353 (1986). "'[N]aked castings into the constitutional sea are not sufficient to command judicial consideration and discussion.'" *In re Rosier, supra* at 616 (quoting *United States v. Phillips*, 433 F.2d 1364, 1366 (8th Cir. 1970)).

Finally, the contention that WPPSS tortiously interfered with the workers' contract rights is rejected.

The elements of the tort of interference with a business expectancy are: (1) existence of a valid contractual relationship or business expectancy; (2) knowledge of the relationship or expectancy by the alleged interfering party (3) intentional interference which induces or causes breach or termination of the relationship or expectancy; and (4) resultant damage. *Sea-Pac Co. v. United Food & Comm'l Workers Local 44*, 103 Wn.2d 800, 805, 699 P.2d 217 (1985). Even if all four elements are present (as the dissent contends they are here), interference is justified as a matter of law if the interferer has engaged in the

exercise of an absolute right equal or superior to the right which was invaded. *Brown v. Safeway Stores, Inc.*, 94 Wn.2d 359, 375, 617 P.2d 704 (1980); *Topline Equip., Inc. v. Stan Witty Land, Inc.*, 31 Wn. App. 86, 93, 639 P.2d 825 (1982). "An absolute right exists only where a person has a definite legal right to act, without any qualification." *Topline Equip., Inc. v. Stan Witty Land, Inc., supra* at 94.

Here, WPPSS has a right both at common law and by statute to protect its own property and to preclude persons who have no permission to enter. RCW 43.52.530(1). Moreover, the workers' activity was a direct violation of the union agreement with Bechtel.

Affirmed.

_____

WE CONCUR:

_____

_____

THOMPSON, J. (dissenting)—I respectfully dissent. The evidence presented (1) fails to establish that the restricted workers were engaged in unprotected labor activity; (2) WPPSS

failed to abide by its own rules and procedures in imposing sanctions against the six workers; and (3) WPPSS acted as accuser, investigator, judge, jury and sentencer. This method of imposing its restrictions constituted an intentional and unjustifiable third party interference with valid contractual relations between Bechtel and the six workers.

WPPSS'security officer, Robert Manion, who was at the scene on November 17, 1982, filed a report describing the incident, but he was unable to identify any of the participants. He interviewed some of the passengers on the bus in an effort to determine the identity of the "picketers." The identity of the passengers interviewed and the contents of their statements were never revealed. The officer did not interview any of the "picketers" or any of the six workers restricted for participating in the melee. Out of the estimated 75 workers involved in the picketing, 14 individuals were identified as either being involved, or possibly involved, and 6 were restricted from WPPSS' property.

On November 19, three workers were advised by letter they had violated WPPSS' published security regulations by participating in a disruption of construction activity, and three others were advised by letter they had violated WPPSS' regulations by physically assaulting a fellow worker. The letters did not state specific allegations of misconduct or advise the six which security regulations had been violated. Each of the six were "immediately restricted indefinitely from access to any Supply System property." The six were given 5 days to submit in writing any circumstances which mitigated their actions.

Each of the six workers responded in writing and admitted they were present at the rally. Each averred he drove separately into an adjoining parking lot, noticed a large crowd forming in the swing shift parking lot, and went to investigate. Although no illegality is involved in entering the swing shift parking lot, WPPSS attacks the credibility of this explanation since the morning crew had no reason to enter the swing shift parking lot. Four of the six workers categorically denied they participated in acts of violence or disrupted construction activities. Two stated they were involved in altercations, but acted in self-defense. Four of the workers stated they had witnesses to corroborate their statements.

Thereafter, on December 1, the day WPPSS received the statements from the six, Detrick, Nicacio, and R. Saltz were restricted from access to WPPSS property for 30 days, and Lane, Wright, and L. Saltz were restricted for 1 year. It is unclear from the record whether WPPSS even considered the accuseds' statements before making their final decision.

Klingelhoefer, WPPSS' manager of Safeguards and Investigations, testified that WPPSS followed its internal procedures which provided for immediate suspension from WPPSS property when such suspension was deemed to be in the best interest of WPPSS. WPPSS' procedures, which were posted and distributed to all the workers, specified that all individuals subject to discipline would be given 5 days to respond in writing as to any mitigating factors and that "[t]he Supply System will, in all cases, provide a fair and impartial review of reports of violations of Safety/Security rules that may result in disciplinary action against an individual."

Klingelhoefer testified:

> [N]othing in the responses changed the story from what we had originally from our interviews and our investigative process. As I stated, the individuals confirmed that they were present at the time. Essentially, I saw no mitigating circumstances that would cause me to believe that we had misidentified any of these individuals or their roles.

Klingelhoefer also testified that the reason he felt there were no mitigating circumstances was because the letters from the six did not contradict or address the issues in the informants' statements.

Klingelhoefer further testified that when the November 19 letters were sent, WPPSS had already concluded that there had been a violation of WPPSS rules. Additionally, Klingelhoefer made his final conclusions and recommendations to his superiors before receiving the written statements from the six.

Harrington, one of the three people who made the ultimate decision to restrict access, testified the letters from the six workers confirmed that the individuals were in fact there. On

the same day WPPSS restricted access to the six workers, their employer Bechtel terminated their employment. The termination was later upheld by an arbitrator because the restriction from WPPSS' worksite meant "there was no available work for the six Grievants . . ."

Three of the workers were restricted simply because they were present at a rally where violent acts occurred without further proof they had engaged in those acts. Neither the trial court nor WPPSS addressed the issue of whether the gathering was a protected labor activity. The majority concludes the violence and unlawful acts rendered the entire incident an unprotected labor activity. Chapter 7 of the National Labor Relations Act, 29 U.S.C. § 157, does not protect any concerted activities which are unlawful, violent, in breach of contract or indefensible. However, under these facts, the majority applies this section too broadly. Chapter 7 does not mean that if violence occurs during protected labor activities, the entire incident becomes unprotected. Rather, the courts have uniformly held that unauthorized acts of violence on the part of individual strikers are not chargeable to other union members in the absence of proof that identifies them as participating in such violence. *Methodist Hosp. of Kentucky, Inc. v. NLRB*, 619 F.2d 563 (6th Cir. 1980); *NLRB v. Sea-Land Serv., Inc.*, 356 F.2d 955 (1st Cir. 1966); *NLRB v. Lambert*, 211 F.2d 91 (5th Cir. 1954); *NLRB v. Deena Artware, Inc.*, 198 F.2d 645 (6th Cir. 1952); *Berkshire Knitting Mills v. NLRB*, 139 F.2d 134 (3d Cir. 1943), *cert. denied*, 322 U.S. 747 (1944); 2 *The Developing Labor Law* 1019-20 (C. Morris 2d ed. 1983).

As stated in *Methodist Hosp. of Kentucky, Inc.*, at 567, the employer may not rely upon unauthorized acts of misconduct as a basis for holding the union members were engaged in unprotected behavior. Rather, the employer must offer proof of identity as to the particular miscreant. The three were wrongfully terminated.

As to the three that were suspended for physically assaulting a fellow worker, if in fact each did participate in an unlawful assault and were not acting in self-defense, then they were not engaged in protected labor activity. According to WPPSS' witnesses, those actively engaged in assaults were identified based

solely on statements from witnesses who requested anonymity. WPPSS did not interview any of the accused or any other workers at the rally. The only people interviewed were the passengers on the bus and WPPSS security officers. Further, WPPSS discounted the workers' explanations because the workers did not address the issues raised by the undisclosed statements; but the workers had not been told the contents of those statements. WPPSS' method of determining who should be suspended did not comport with even the most rudimentary concepts of fairness. The six workers were told they were guilty of unnamed acts which were a violation of undesignated rules and guilt was determined through interviews with undisclosed witnesses who gave statements, the contents of which were likewise not disclosed. The workers were advised by letter, not that they may offer evidence of their innocence, but only that they may provide statements of mitigating factors. Although each worker denied wrongdoing, their statements were given no weight by those charged with the responsibility of imposing sanctions. If the three who were restricted for physical violence did assault a fellow worker, they were involved in an unprotected labor activity. However, WPPSS' method of establishing identity and culpability leaves in serious doubt the validity of its final conclusion that the three accused assaulters were in fact guilty.

Under a theory of agency or ratification, a union worker can be accountable for the violent acts of other union members. *NLRB v. Sea-Land Serv., Inc., supra.* However, agency or ratification cannot be based on the mere failure to abandon the activity or failure to repudiate and denounce the violence. *International Ladies' Garment Workers' Union v. NLRB*, 237 F.2d 545 (D.C. Cir. 1956). This rule is a necessary safeguard to the union and its members since in the confusion and tense situation created by a strike accompanied by picketing, it would be a simple matter to incite acts of violence and destroy the protected status of the strikers. *Sea-Land Serv., Inc.*, at 966.

I conclude that under RCW 49.32.050(5), (6), and (9), and RCW 49.36.010,[1] the November 17th gathering was a protected union activity. The noted statutes authorize union activity for legitimate purposes, which include giving publicity to the existence of a labor dispute, and authorize assembling and promoting union interests. Mere presence at such an activity wherein violence occurred did not render the entire gathering an unprotected activity, and the method of determining who was involved in violent acts was so unfair, the ultimate determination was tainted. Thus, I would conclude that the workers were engaged in protected labor activity and were illegally excluded from WPPSS' property.

WPPSS has a "Policy for Review of Violations of Safety/Security Regulations" and is legally bound to follow those procedures in dealing with perceived violations of those regulations. *Brady v. Daily World*, 105 Wn.2d 770, 718 P.2d 785 (1986).

WPPSS' written policy for review of violations of safety/security regulations was posted on all of the construction sites, and procedures were published internally within WPPSS and transmitted to Bechtel and the individual work force. The procedures provided for "a fair and impartial review of reports of violations of Safety/Security rules that may result in disciplinary action against an individual." This fair and impartial

---

[1] RCW 49.32.050:

"(5) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not invoving fraud or violence;

"(6) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

" . . .

"(9) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in RCW 49.32.030."

RCW 49.36.010:

"Unions legalized. It shall be lawful for working men and women to organize themselves into, or carry on labor unions for the purpose of lessening the hours of labor or increasing the wages or bettering the conditions of the members of such organizations; or carry out their legitimate purposes by any lawful means."

review was applicable to incidences where the individual was immediately suspended for fighting. WPPSS acted as accuser, investigator, judge, jury and sentencer. WPPSS accused the six of violating its regulations, WPPSS' security officials conducted the investigation, WPPSS' managers determined a violation had occurred, and WPPSS meted out the punishment.

As stated by Montesquieu:

> All would be lost if the same man or the same body of leaders, either of the nobles or of the people, exercised these three powers: that of making laws, that of executing the public resolutions, and that of judging criminal and civil cases.

W. Gwyn, *The Meaning of the Separation of Powers* 110 (1965) (quoted in *In re Juvenile Director*, 87 Wn.2d 232, 238, 552 P.2d 163 (1976)). The investigation conducted by WPPSS, as previously described in this dissent, was so one-sided and so devoid of impartiality in the methods used to collect and evaluate evidence as to constitute a violation of WPPSS' promise to conduct a fair and impartial review. The workers were prejudged without a hearing, convicted without a voice, and punished severely without any recourse. The six were not accorded a fair and impartial review as promised in published WPPSS policy provisions.

Plaintiffs also alleged that WPPSS intentionally and unjustifiably interfered with the valid contract of employment with Bechtel. The facts support such a contention.

> One who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract.

Restatement (Second) of Torts § 766 (1977).

The elements of the tort of intentional and unjustifiable third party interference with valid contractual relationship or business expectancy; (2) knowledge of the relationship or expectancy on the part of the interferer; (3) intentional interference inducing or causing a breach or termination of the relationship or expectancy; and (4) resultant damage to the party whose relationship or expectancy has been disrupted. *Calbom v. Knudtzon*, 65 Wn.2d 157, 396 P.2d 148 (1964).

The first, second and fourth elements are easily satisfied. The six workers' union had a contract and labor stabilization agreement with Bechtel. The individuals worked under the terms of those agreements when on WPPSS property and there is no dispute regarding WPPSS' knowledge of this contractual arrangement. Further, when WPPSS suspended the six workers, Bechtel terminated the workers for the sole reason they were "restricted by Supply System." All the workers suffered pecuniary loss because they were unable to obtain other employment. The third element is the key. Did WPPSS intentionally and unjustifiably interfere with the workers' contractual relations? The interference must be both intentional and improper.

Interference is intentional if the actor acts for the primary purpose of interfering with the contract or if the actor does not act for the purpose of interfering with the contract or desire it, but knows that the interference is certain or substantially certain to occur as a result of his action. In other words, the rule applies to an interference that is incidental to the actor's independent purpose and desire but known to him to be a necessary consequence of his actions. Restatement (Second) of Torts § 766, comment *j*. Here, WPPSS can be presumed to know that if it suspended the six workers, the likelihood of termination by Bechtel was inevitable.

Factors the court considers when determining whether the interference is improper are: (1) the nature of the actor's conduct; (2) the actor's motive; (3) the interests of the other with which the actor's conduct interferes; (4) the interests sought to be advanced by the actor; (5) the social interests in protecting the freedom of action of the actor and the contractual interests of the other; (6) the proximity or remoteness of the actor's

conduct to the interference; and (7) the relations between the parties. Restatement (Second) of Torts § 767.

When analyzing the actor's conduct, the issue is not simply whether the actor is justified in causing the harm, but rather, whether he is justified in causing it in the manner in which he does cause it. Here, WPPSS' failure to accord the accused workers any of the rights regarded as basic to a fair determination of culpability (*i.e.*, the right to know who your accusers are, the right to confront your accusers, the right to present witnesses on your behalf) leads to the conclusion that the manner in which WPPSS caused the harm was not justified. WPPSS had the right to try to avert violence and possible work stoppage. But the legitimate end they sought to achieve will not whitewash the improper method of achieving it. Although WPPSS was attempting to protect an important interest of its own, it did so in an indefensible manner. WPPSS should be held liable for intentional and unjustifiable third party interference with a valid contractual relationship.

This case should be remanded for further proceedings to determine what damages were sustained by the workers as the proximate result of WPPSS' actions.

Appendix B

IN THE SUPERIOR COURT OF
THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF BENTON

PLUMBERS AND STEAMFITTERS UNION LOCAL 598, et al.,	)
Plaintiffs,	)
vs.	) CAUSE NO. 83-2-00864-3
WASHINGTON PUBLIC POWER SUPPLY SYSTEM,	)
Defendant.	) MEMORANDUM DECISION

It is interesting to note that there is a virtual dirth *(sic)* of authority concerning the issue at hand, and it is of further interest to observe that if the law required as an element of due process such a hearing as the plaintiffs contend, one would have expected there to be an abundance of law on the nature and extent of such right "in the books."

The only cases cited to the Court on the subject appear to be *Cafeteria & Restaurant Workers v. McElroy*, 367 U.S. 886 (1961), and *Phillips v. Bureau of Prisons*, 591 F.2d 966 (1979).

Plaintiffs have made reference to other examples where hearings have been accorded, such as 10 CFR, Part 25. This appears to relate to national security matters, which is not the case here. It may well be that there are procedures which have been adopted by other entities in similar situations. The question is whether they are legally required.

It does seem that the plaintiffs' abilities to contest their exclusion from the project were extremely limited, but if redress is to be accorded them, it would appear to require a rather broad extension of constitutional principles not warranted by the present state of the law.

It is certainly possible that the appellate courts of this state

may determine that the Washington Constitution provides more protection in this area than the Federal Constitution. If this is the case, such revelation ought to come from the appellate courts and not the trial court.

I do not believe plaintiffs' claim that they were restricted prior to having an opportunity to respond is well taken. The November 19, 1982, letters use the term "restricted," instead of "suspended"; however, a total reading of the record does not warrant a conclusion that the "restriction" was anything other than a suspension pending resolution of the matter as provided by Exhibit 55, paragraph 4.

Finding no infringement of any legally cognizable rights, the complaint if dismissed.

DATED this 25th day of January, 1985.

FRED R. STAPLES,
Superior Court Judge

IN THE SUPERIOR COURT OF
THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF BENTON

PLUMBERS AND STEAMFITTERS UNION LOCAL 598, DONALD LANE LARRY J. SALTZ, BUDDY D. WRIGHT, PEDRO A. NICACIO III, ROY L. SALTZ and ALLEN DIETRICK,	) NO. 83-2-00864-3
Plaintiffs,	) FINDINGS OF FACT AND CONCLUSIONS OF LAW
v.	
WASHINGTON PUBLIC POWER SUPPLY SYSTEM,	
Defendant.	

This matter came before the Court for trial on November 5, 1984. The underlying issue involved the expulsion of six individuals employed by the Bechtel Corporation to work on Washington Public Power Supply System property from that property and their jobs by the Washington Public Power Supply System.

The Court made three rulings during the course of the case which shaped the manner in which the case was presented. The first was that the Court would not take testimony to establish what actually occurred during the alleged incidents.

The second ruling was that the trial would focus on issues of liability. Issues relating to damages were reserved—if they were to be reached at all—for a later date.

The third ruling was that the parties were requested to submit information after close of trial about practices at other facilities. Both parties submitted such information.

On the basis of the trial, the exhibits, the briefs, the oral argument and the post-trial submissions, the Court hereby

makes the following Findings of Fact and Conclusions of Law and directs entry of an order dismissing the complaint in this case.

FINDINGS OF FACT

1. Plaintiffs are six individuals and a labor union. The six individual Plaintiffs were employed by the Bechtel Power Corporation in the construction and completion of Washington Public Power Supply System's Nuclear Project No. 2 ("WNP-2"), located on the Federal Government's Hanford Reservation near Richland, Washington, in Benton County.

2. Plaintiff Union Local 598 of the Plumbers and Steamfitters Union had a contract and labor stabilization agreement with Bechtel Power Corporation. The individuals worked under the terms of those agreements.

3. Plaintiff Union had no labor contract or agreement with the Supply System. The six individual Plaintiffs were not at any time relevant to this controversy, employed by the Supply System.

4. Defendant Washington Public Power Supply System ("Supply System") is a municipal corporation and joint operating agency in the State of Washington, with its principal place of business in Richland, Washington.

5. The Supply System is the owner of WNP-2, which is a nuclear power plant located on the Hanford Reservation.

6. Prior to the events at issue in this case, the Supply System published a Schedule for Disciplinary Action for Safety Violations and for Security Violations. The schedule states an offense and a penalty.

7. The Supply System also had a "Policy for Review of Violation of Safety/Security Regulations."

8. On November 17, 1982, an incident occurred in the parking lot outside the gate to WNP-2, one of the Supply System projects.

9. The incident involved certain buses operated by the Ben-Franklin Metropolitan bus system and a group of individuals who expressed the belief that the buses should not have been utilized.

10. A scuffle is alleged to have occurred as part of that incident.

11. A Supply System security guard observed the incident and prepared an internal incident report.

12. Additionally, the Supply System security division conducted an internal investigation which included taking statements from persons who were on the buses and who left the buses or attempted to leave the buses.

13. Those statements were taken only after the individuals requested total anonymity and were assured that their identities would not be divulged.

14. The internal investigation conducted by the Supply System and the incident reports prepared by the security personnel contained the following facts:

a. A group of 50-75 persons attempted to prevent the off-loading of passengers from the buses that had arrived at WNP-2. Included in passengers on those buses were Rodney Harrington and Frank Sartain. Upon exiting the bus in which he was riding, Rod Harrington was beaten to the ground, causing him severe injuries which later required medical attention at the WNP-2 First-Aid Station. Mr. Harrington was put back on the bus, which bus left the swing-shift parking lot without off-loading its passengers.

b. Frank Sartain was a passenger on the second bus that arrived at the swing-shift parking lot. Mr. Sartain had off-loaded and was heading to the entrance gate leading into the construction area. He was stopped and confronted by two persons from the group that gathered and was verbally threatened and physically assaulted.

c. The actions of this group prevented several, if not all of the persons who were on the buses, from getting to work on time and generally created a climate of fear and confrontation that caused a disruption to the legitimate construction activities being conducted at WNP-2.

d. All activities identified herein took place on property (WNP-2) controlled by the Supply System.

e. The six individual Plaintiffs were identified as having participated in the melee that took place on November 17, 1982.

15. This information led the Supply System to conclude that three of the Plaintiffs, Larry S. Saltz, Buddy D. Wright and

Donald Lane had been involved in the assault on Mr. Harrington and Mr. Sartain; while the other three Plaintiffs, Allan Dietrick, Pete Nicacio and Roy L. Saltz had taken part in the disruption of construction activities, all in violation of the Supply System project site security and safety rules.

16. In accordance with the procedures promulated by the Supply System, the six individual Plaintiffs all received letters on November 19, 1982; which letters notified the Plaintiffs that they were suspended immediately from entering upon Supply System property because of their actions and the events which took place on November 17, 1982.

17. The Supply System initially suspended the six Plaintiffs from coming on to its property, pending its further determination of what, if any, action should be taken after receipt of the response letters solicited from the Plaintiffs. Although the November 19, 1982 suspension letter used in its text the word "restricted," I find that the Supply System intended to suspend the individuals, pending receipt of their responses, as requested by the November 19, 1982 letters.

18. The six individual Plaintiffs responded in writing as requested by the suspension letters; which response letters were admitted into evidence as exhibits 4, 11, 21, 25, 32 and 39.

19. On December 1, 1982, the Supply System's officers (Harrington, Administration; Bensussen, Legal; and Telander, Security) charged with the responsibility for making the final decision on the events described herein, held a meeting to consider what, if any, action should be taken. At that meeting, due consideration was given to the response letters and the internal investigation by the Supply System security personnel. In accordance with the Supply System's internal rules and procedures, the decision was made at that meeting to restrict three of the Plaintiffs (L. Saltz, Wright and Lane) for one year and three of the Plaintiffs (R. Saltz, Dietrick and Nicacio) for 30 days from coming on to the Supply System property.

20. Bechtel simultaneously terminated the employment of each individual stating "Restricted by Supply System" as the basis for the termination.

21. The Supply System did not direct, require or participate in Bechtel's decision to terminate the Plaintiffs' employment.

22. All actions described herein taken by the Supply System were done in accordance with its internal rules and procedures.

23. The Supply System took no other adverse action against the Plaintiffs which prevented Plaintiffs from obtaining employment anywhere else within the territorial limits of the Plaintiff Union Local 598 or anywhere else in the United States.

24. The only benefit to which Plaintiffs may legitimately make claim, under the facts of the present case, is the benefit to come on to public property, which benefit is permissive and limited in nature; subject to withdrawal by the Supply System.

25. The benefit of coming on to Supply System property was a unilateral expectation of the plaintiffs and not created by State or Federal law, nor is such a claim of entitlement supported by a mutually explicit understanding between the Plaintiffs and the Supply System, by contract (either expressed or implied) or by any legitimate rule.

26. Plaintiffs have no property interest which has been affected by the Supply System's action.

27. Plaintiffs have no liberty interests which have been affected by the Supply System actions.

CONCLUSIONS OF LAW

1. No infringement of Plaintiffs' legally recognizable rights has occurred in the present case.

2. Plaintiffs have not been deprived by Supply System of any protectible property interest which would entitle Plaintiffs to due process of law.

3. Plaintiffs have not been deprived by the Supply System of any protectible liberty interest which would entitle Plaintiffs to due process of law.

4. The Supply System has not acted arbitrarily or discriminated against Plaintiffs.

ORDER OF DISMISSAL

Based on the foregoing; NOW THEREFORE

IT IS ORDERED that Plaintiffs complaint is dismissed with prejudice and without costs.

DATED this 29th day of March, 1985.

/s/ Staples
JUDGE

Presented by:

STANLEY J. BENSUSSEN
Washington Public Power Supply System

Approved as to form;
Notice of presentation waived:

JOHN BURNS
Attorney for Plaintiff

No. 7068-9-III
Plumbers & Steamfitters v. WPPSS

Appendix C

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

PLUMBERS AND STEAMFITTERS UNION LOCAL 598, DONALD LANE, LARRY J. SALTZ, BUDDY D. WRIGHT, PEDRO A. NICACIO, III, ROY A. SALTZ, and ALLEN DERRICK,	) No. 7068-9-III
Appellants,	) Panel Two
v.	)
WASHINGTON PUBLIC POWER SUPPLY SYSTEM,	) ORDER DENYING
Respondent.	) MOTION FOR RECONSIDERATION

The Court has considered the Motion for Reconsideration and the Answer and that motion is denied.

DATED: October 10, 1986.

BY THE COURT:

CHIEF JUDGE

Appendix *D*

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

Hafer, Price, Rinehart &
Schwerin
Mr. James Cline
Mr. John R. Burns
2505 3rd Avenue, Suite 309
Seattle, Washington 98121

Mr. Stanley Bensussen
Attorney at Law
P.O. Box 968
Richland, Washington 99352

Re: Supreme Court No. 53318-1 - Plumbers and Steamfitters Union Local 598, et al. v. W.P.P.S.S.
Court of Appeals No. 7068-9-III

Counsel:

The above entitled petition for review was considered by the Court on its January 6, 1987, petition for review calendar.

The petition was denied by order number 157/20 filed on January 6, 1987.

Very truly yours,

REGINALD N. SHRIVER
Supreme Court Clerk

RNS:crf

Appendix E

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

PLUMBERS AND STEAMFITTERS UNION LOCAL 598, et al,	)	
Appellants,	)	**MANDATE**
v.	)	No. 7068-9-III
WASHINGTON PUBLIC POWER SUPPLY SYSTEM,	)	No. 83-2-000684-3
Respondent.	)	

The State of Washington to: The Superior Court of the State of Washington in and for Benton County.

This is to certify that the opinion of the Court of Appeals of the State of Washington, Division III, filed on August 14, 1986, became the decision terminating review of this court in the above entitled case on January 6, 1987. This cause is mandated to the superior court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion. Costs on the appeal in the amount of $300.65 in favor of the respondent and against the appellant.

cc: John Burns
Michael McGrorey
Stanley Bensussen
Reporter of Decisions
The Hon. Fred Staples

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Spokane, this 13th day of January, 1987.

Clerk of the Court of Appeals, State of Washington, Division III.